

Written Testimony Charles Jennings, CEO of Supertracks, Inc

Submitted for the November 29, 2000 hearing being jointly held by the United States Copyright Office, Library of Congress; National Telecommunication & Information Administration, United States Department of Commerce on the effects of amendments made by Title 1 of the DMCA and the development of electronic commerce on the operation of Sections 109 and 117 of Title 17 of the United States Code.

November 22, 2000

Ladies and Gentlemen:

My name is Charles Jennings, and I am the founder and CEO of Supertracks.com, Inc. Supertracks has offices in Portland, Oregon and Santa Monica, California employing about 75 people. Supertracks is a technology company that creates and provides the technology necessary for the delivery of digital commerce using the Internet. The company originally focused on digital rights management for digital music downloads. We are now addressing additional areas of concern in the market as it relates to digital content delivery.

Personally, I have been extensively involved as a successful creator of content, and in founding and running several technology companies. As a creator of content, I have been a newspaper columnist and authored six books, including my latest book, The Hundredth Window: Privacy and Security in the Age of the Internet (Simon & Schuster/The Free Press, May 2000), which I co-authored with Lori Fena. Additionally, I am a former film and television producer for Paramount and Warner Brothers. I am currently the Chairman of the Board of Trustees at The Northwest Academy, a private arts high school in Portland, Oregon. I am also the co-creator of the comic strip Pluggers, with three-time Pulitzer Prize-winning cartoonist Jeff MacNelly, a comic strip that is nationally syndicated and reaches 100 million readers daily.

Besides my current participation with Supertracks, my involvement in technology has been just as broad and diverse. I have helped to shape standards on the Internet since the early 1990s as a co-founder and a director of TRUSTe, a non-profit Internet privacy initiative that was, and continues to be, sponsored by Microsoft Corp., America Online, IBM, Yahoo, and other leading Internet companies. I am the Chairman and Co-Founder of GeoTrust, a company specializing in business-to-business trust and authentication over the Internet. Additionally, I co-founded Preview Systems, a company involved in digital commerce where I helped design one of the Internet's premier content protection systems and as a result, co-hold the U.S. patent for digital downloading in a container model (the Tycksen-Jennings patent).

For these reasons, I believe I am in a unique position to address issues in digital commerce and the Internet.

I would like to speak to several of the issues raised at this hearing, starting with the question, "What are the policy justifications for or against an amendment to Section 109 to include digital transmissions, and what specific facts can you provide to support your position?" It is my position and belief that the rights of consumers, which they now enjoy as a result of the first sale doctrine in the physical goods world, should be extended to digital commerce by amending Section 109.



As many of you are aware, there are content owners who oppose the extension of consumer's rights into digital goods. I do not believe their reasons for opposition stand up against real world experience and realities. One of their fears is losing control of their content once it is put on the Internet because a digital good is a perfect copy. Since each copy is essentially an original, they fear that they will lose the ability to capture value in that good. This is true if the statement is left at that point. In reality, technology is now available to protect digital goods in such a way as to prevent unauthorized copying. Today, it is both possible and practical to secure and protect digital goods on the Internet. There is no valid reason not to extend the same rights to digital goods as those in the physical world.

At Preview Systems, we built a secure and robust delivery system for digital software. We proved that commerce could be conducted over the Internet with digital goods in such a way as to protect those goods while facilitating distribution. We were also able to do this at Supertracks, where we build a secure and robust delivery system for the digital download of music. Those digital copies have as much, if not more, copy protections as the same song delivered in a physical medium, such as a compact disk. In fact, it is possible to provide greater copy protection in the digital world, which if used as the standard, could lead to an erosion of the rights and protections afforded consumers for physical goods.

Legally, when digital goods are treated differently from physical goods, it allows content owners to apply different rules to those goods, rules that have a direct negative effect on consumers. These differences are not consumer friendly, and the rules imposed by content owners are often hostile to consumers. In our experience at Supertracks, for example, we found that record companies would classify a digital download as a right-of-use, not as a sale with rights of possession. When a consumer buys a good, he or she has rights and protections that they would not otherwise have if they were only entering into a right-of-use, or a licensing agreement. As a result, a license grant, as oppose to actual ownership, subjects consumers to restrictions in the form of "click-through" contracts when purchasing a download. When contracts are presented in a "take it or leave it" fashion, the consumer has no choice or bargaining power if they want access to the content.

These contracts often contain clauses that severely limit what a consumer can do with the downloaded music. They limit how many times the consumer can back up their copy, how long they can have it, and so forth. In our experience, when consumers were unable to download an album or experience a problem with a download, they were unable to obtain a refund for the music they purchased -- unless the retailer (but not the label) was willing to absorb the cost of a refund. What this meant, in reality, was that Supertracks would refund the wholesale price to the retailer, and the retailer would provide a refund to the consumer as part of their good business practices. However, we were unable to get refunds from the content providers who dictated the terms of the download. The only reason consumers received a refund was because retailers didn't want to lose a customer, not because the customer had any right to get a refund on a defective digital product.

Consumers expect to have the same rights of ownership they have with physical goods. We found that they don't understand why they can't do the same things with their digital good as they could with the same product in a physical format. Why can't they



lend it, resell it, make a copy to listen to in the car, given the same kinds of restrictions in the physical world? Especially when the digital product can be designed to allow for those abilities? Why don't they have the same consumer protection rights as they would have with music they bought in some other form?

The key to digital commerce is acceptance by consumers. Consumers won't accept digital commerce until it is ubiquitous, easy-to-access and can be used/consumed in a manner that is satisfying. If they don't have the same rights with digital goods as physical goods, markets are unlikely to develop. Consumers won't buy digital goods if restrictions put on digital downloads cause the buying experience to be cumbersome. We saw this in our own experience at Supertracks. We built the software and infrastructure, but no one came to buy the music. The reason was simple. Consumers found the experience too restrictive and cumbersome. This experience was not unique to Supertracks, it was experienced by the industry as a whole. We are finding the same thing in other forms of digital delivery as well. The current law makes it extremely difficult to give the consumer a rich experience that will encourage purchases. When they purchase a digital good, current law does not extend the kind of protections that make it a worthwhile investment. As a result, they refuse to buy music under these conditions. If consumers aren't buying, there is no market. Without a market, content owners won't be paid for the product they have the rights to sell. Everyone loses.

Another issue we found when a digital delivery is classified as a license and not a sale is the ability of the content owner to set prices in the market place. Essentially, the record companies have been able to dictate prices for those goods sold to wholesalers and retailers. We found this to be the case in our capacity as a wholesaler of digital music at Supertracks. We were told what price and what margin we could take on the music we bought from content owners and resold to retailers. The retailers were told the same thing when it came to selling the music as a digital download. Unless digital content is treated like other content, a warping of market protections will continue for both the businesses involved in selling those goods and for the consumer.

I would like to briefly address another question raised at this hearing, "What are the policy justifications for or against an expansion to the archival copy exception in Section 117 to cover works other than computer programs?"

Let me to return to the idea that a digital good bought by a consumer should be a good bought, not a good licensed, leased or sold in some other form of nonpermanent ownership. Consumers should be able to move or store music they have purchased to other personal, non-commercial devices. They should be able to protect their investment by making archived copies for personal use, whether or not those copies are susceptible to destruction by mechanical or electrical failure. In the physical world, they already have this right. In the digital world, they don't.

Again, it's about the consumer and their experience, their expectations. It's about protections for their basic rights in goods sold.

Finally, I will address the question, "What are the policy justifications for or against an exemption to permit the making of temporary digital copies of works that are incidental to the operation of a device in the course of a lawful use of a work, and what specific facts can you provide to support how such an exemption could further or hinder electronic commerce and Internet growth?"



To answer this question, I would like to speak in general terms as to how the Internet works in the delivery of content. One of the first steps for delivering content is making a copy of the good to be delivered on a server. Often several copies need to be made for the purpose of delivering that content in different formats. In today's market, for example, there is no uniformity in types of music players for digital music or formats for accepting digital music on personal computers or portable devices. The same holds true for other kinds of digital content.

The server must deliver that copy to other servers in the network that make up the Internet which consists of thousands of computers and servers all interconnected. Some of these are called proxy servers, some routers, each performing an essential step in the process of delivery to the person who will finally receive it on some kind of machine that will make the digital content perceivable to them, usually a personal computer (PC). In reality, many copies of the content are made before it ever reaches a machine where it can be rendered into a form a human can experience it (i.e. listened in the case of music). Once it reaches a machine, the PC must make copies in the cache and RAM before it can be rendered. All of these copies have to take place as the data (song, book, etc.) is passed along the network. Nevertheless, these copies are not the same as reproductions that constitute a product a consumer can access and use.

When we encrypt music at Supertracks, we have to make more than one copy in the process. When we prepare that song in different formats we have to make more than one copy. These copies are not the end product, which is finally delivered to the consumer; they are a part of the process for getting it to the consumer. Copyright owners are not losing potential revenue by the making of these various copies along the delivery line since a revenue-generating event doesn't happen until a consumer can listen to the song (download or stream). By subjecting the necessary copies made in the process of delivery over the Internet and in the RAM of a personal computer to copyright liability for infringement, current law blocks the ability of the Internet to act as an economical conduit for digital commerce. The only copy that should matter is the one the consumer has the ability to consume. None of these copies, so long as unauthorized access can be prevented, including the one made in RAM, should be subject to copyright liability for infringement as they are part of enabling the process of delivery, and not the end product.

In conclusion of my testimony, I wish to thank the United States Copyright Office and the National Telecommunication & Information Administration for this opportunity to submit testimony on these important issues of digital commerce. I am happy to answer further questions you may have.

Respectfully Submitted,

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